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No. 82-235

In The Supreme Court of the United States

October Term, 1982

G. PATRICK MORRIS, er al,

Petitioners,

-vs-

UNITED STATES OF AMERICA and JAMES G. WATT, SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT
OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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ARGUMENT

The arguments advanced by the respondents serve to emphasize that the decision of the Court of Appeals conflicts with decisions of this Court, and that it should be reversed.

I

This Court's refusal to review the case following the first appeal imported "no expression of opinion on the merits." *Sunal vs. Large,* 332 U.S. 174, 181 (1947); *Polites vs. United States,* 364 U.S. 426, 433, n9 (1960).

Even though this Court denied Petitioners' Petition for a Writ of Certiorari following the first appeal, this Court now may consider questions raised on the first appeal as well as those that were before the Court of Appeals upon the second appeal. *Mercer vs. Theriot,* 377 U.S. 152, 153-154 (1964); *Hamilton-Brown Shoe Co. vs. Wolf Bros. & Co.,* 240 U.S. 251, 257 (1916); *Panama Railroad Co. vs. Napier Shipping Co.,* 166 U.S. 280, 284 (1897).

In their Brief in opposition to the earlier Petition for a Writ of Certiorari, No. 79-7, the respondents did not challenge the petitioners' assertion that several issues were left undecided by the opinion of the Court of Appeals in the first appeal.

It is obvious from a comparison of the 1976 decision of the District Court (Pet. App. F), and the opinions of the Court of Appeals (Pet. App. A, B and C), with the allegations of the Complaint (R

1-12) and the allegations the petitioners sought to add by amendment (R 59-65), that many issues were not considered at all by the District Court or by the Court of Appeals and that there has been no "application of the judicial mind to the precise question(s) necessary to be determined to fix the rights of the parties." *St. Louis, V. & T.H.R. Co. vs. Terra Haute & I.R. Co.*, 145 U.S. 293 (1892), citing *Carroll vs. Carroll*, 57 U.S. 128, 136, 16 How. 275, 287.

The relief fashioned by the District Court in its 1976 Judgment, coupled with the petitioners' willingness to file the instruments of divestiture, made it unnecessary for the District Court to consider any issues other than estoppel and 5 U.S.C. § 552. The usurpation by the Court of Appeals of the District Court's authority and duty to deal with the other issues in the first instance, upon reversal on the first appeal, constituted such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision by issuing a Writ of Certiorari. U.S. Supreme Court Rule 17.1(a); *Firestone Tire & Rubber Co. vs. Risjord*, 449 U.S. 368, 374 (1981).

The numerous issues that were not mentioned in the opinion and were not addressed by either the District Court or the Court of Appeals directly, at least in their present form, require that the case be remanded to the District Court for consideration of the issues not addressed by the District Court and the Court of Appeals. *Cf., G.D. Searle & Co. vs. Cohn*, 455 U.S. ____, (No. 80-644, Feb. 24, 1982, Slip Op. 9-10).

"***Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." *Califano vs. Sanders*, 430 U.S. 99, 109 (1977). The administrative record in this case was not a sufficient basis for resolution of factual questions involved in the constitutional issues. The respondents did not present affidavits or other evidence to show that there was no genuine issue with respect to any material fact involved in any of the constitutional issues. The record before the District Court and before the Court of Appeals was inadequate for resolution of the constitutional issues. Among the numerous constitutional issues is the question of whether the issuance of patents for other desert land entries that were developed under similar arrangements, while declaring these entries invalid, violates the equal protection aspect of the due process clause of the United States Constitution. These constitutional issues could not have been properly resolved by either the District Court or the Court of Appeals, and the case should be remanded to the District Court for full consideration of those issues.

II

Respondent's claim (Br. in Opp. 11) that the Court of Appeals had jurisdiction of the first appeal because the petitioners appealed from the 1976 Judgment and did not raise the issue of appellate jurisdiction in the Court of Appeals or in their Petition for a Writ of Certiorari is without merit.

Neither the action of the Court of Appeals nor the consent of the parties can confer jurisdiction, and the jurisdictional requirements cannot be waived. *443 Cans of Frozen Egg Product vs. United States*, 226 U.S. 172, 184 (1912).

Respondents' reliance upon *Republic Natural Gas Co. vs. Oklahoma*, 334 U.S. 62 (1948), and other cases (Br. in Opp. 11) is misplaced. None of the cited cases hold that the threat of hardship to one party makes an order final for purposes of an appeal by the opposing party.

Respondents also are mistaken in their analysis of the District Court's 1976 Judgment. That Judgment did not require the petitioners to divest themselves of their desert land entries, it merely required them to divest themselves of the agreements that the IBLA interpreted as constituting violations of the holding limitation of 43 U.S.C. § 329. By their compliance with the divestiture provision of the 1976 Judgment, the petitioners were entitled to retain their entries, and there simply was no issue of difficulty in regaining their entries, as suggested by the respondents (Br. in Opp. 11).

The respondents are wrong in their assertion that the District Court ruled against the petitioners on the issue of liability. Until the District Court actually rules that its findings and rulings on the holding issue and on the assignment issue prelude an award of damages to the petitioners, that issue remains undecided. Furthermore, the District Court's estoppel ruling was sufficient ground to prevent applica-

tion of the IBLA's interpretation of § 329, and there is no basis in the record for inferring that the District Court intended its ruling to preclude liability for damages.

Respondents now assert (Br. in Opp. 12) that the Court of Appeals had jurisdiction of the first appeal under 28 U.S.C. § 1292 (a)(1), but in the Court of Appeals the respondents asserted that jurisdiction rested on 28 U.S.C. § 1291[1], and § 1292 (a)(1) was never mentioned. Furthermore, the District Court's 1976 order did not grant an injunction, it granted relief in the nature of mandamus, requiring the performance of a ministerial act wrongfully withheld by the Secretary of the Interior. Therefore § 1292(a)(1) is not applicable to the 1976 Judgment.

III

This case is not, as asserted by the respondents, one in which the petitioners have stood by their pleading and appealed from a Judgment of Dismissal. The District Court's 1976 Judgment was not one of dismissal, but one which granted relief to the petitioners on the basis of their Complaint.

If the opinion of the Court of Appeals in the first appeal is given the effect sought by the respondents (Br. in Opp. 13) and granted by the Court in Appeals in the second appeal, the result is but another example of unauthorized usurpation of the authority and duties of the District Court requiring the exer-

[1]Brief for the United States, Appellee, Cross-Apellant 1, 9th Cir. No. 77-1914.

cise of this Court's power of supervision under Rule 17. In view of the favorable nature of the 1976 Judgment, it would have been a waste of the District Court's time for the petitioners at that time to file their Motion for Leave to Amend Complaint. Nothing in the realm of judicial efficiency required or authorized the Court of Appeals to issue an opinion effectively denying all opportunity to amend the Complaint, when there was no motion to amend before the Court and the necessity for amending the Complaint was not apparent to any of the parties.

There was no finding by the District Court that the petitioners' Motion for Leave to Amend Complaint was unduly delayed, made in bad faith or with dilatory motive, or was futile. The District Court denied that motion because it took the position that all the issues had been decided by the Court of Appeals on the first appeal (Pet. Apps. G and I). The necessity for seeking amendments to the Complaint did not become apparent until the mandate came down from the Court of Appeals following the first appeal and the respondents first made their claim that the opinion in the first appeal decided all the issues previously pleaded. Justice clearly requires that the petitioners have a full opportunity to present, and to have decided, all valid issues in the case.

CONCLUSION

For the reasons stated above, as well as those stated in the Petition for a Writ of Certiorari, the Petition should be granted.

Respectfully submitted.

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